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No. 81-2159

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased
Appellant

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE STATE OF WISCONSIN AND ACCOMPANYING BRIEF AMICUS CURIAE IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

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No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased

Appellant

v.

KERR-McGEE CORPORATION, a Delaware Corporation and KERR-McGEE NUCLEAR CORPORATION, a Delaware Corporation

Appellees

MOTION FOR LEAVE TO FILE STATE AMICUS CURIAE BRIEF IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

Pursuant to Rule 36 of the Rules of the Supreme Court, movant respectfully requests leave to file the accompanying brief amicus curiae in opposition to the brief of the Solicitor General herein.

The brief of the Solicitor General raises substantial questions concerning the power of the states to enforce laws of

general application pursuant to traditional police powers, for protection of public health and safety. The States amici on the acompanying brief seek to present for the consideration of the court views responsive to the points made by the Solicitor General on the profoundly important questions of federalism raised in this matter.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

SUMMARY AND INTEREST OF AMICI

In response to this Court's Order of October 4, 1982, the Solictor General of the United States filed herein an amicus curiae brief dated November, 1982 presenting the views of the United States regarding the federal preemption of state law ordered by the court below, Silkwood v. Kerr-McGee Corporation, 667 P.2d 908

(10th Cir. 1981). The Solicitor General's brief, which supports the 10th Circuit's decision to reverse a jury's award of punitive damages under Oklahoma's exemplary damages statute, 23 Okla. Stat. 9, represents an endorsement by the U.S. Justice Department of a major and unprecedented undermining of traditional states' rights. Few decisions have so seriously encroached upon the authority of state and local governments to provide health and safety protection for their citizens. The decision below, if not reversed, will leave states powerless to meaningfully protect their citizens against reckless and life threatening mishandling of radioactive materials. The States joined herein submit this brief pursuant to Rule 36 of the Rules of the Supreme Court, in response to the too facile arguments and analysis of the Solicitor General. Amici consider this

case to frame important issues of federalism in which each of the states is interested. Amici support appellant's request that this case be given plenary review so that the decision of the Court of Appeals may be reversed.

ARGUMENT

Contrary to the assertions of the Solicitor General at pages 12 and 13 of his brief, Congress has never expressly precluded state regulation of hazardous radioactive materials, nor expressly withheld any authority from the states pursuant to Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k). This view was confirmed by the Eighth Circuit in Northern States Power Co. v. Minnesota, 447 F.2d 1143 (1971) aff'd mem. 405 U.S. 1035 (1972), which held,

"no provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants." 447 F.2d at 1147.

In evaluating the preemptive effect of Section 274(k), the Northern States Power court applied several detailed criteria, 447 F.2d at 1146-1167. On the basis of these criteria, the court determined that a state regulation which limited the release to the environment of radioactive wastes from nuclear power plants by setting emissions standards lower than those fixed by the Nuclear Regulatory Commission (NRC) had been implicitly preempted by Congress.

The conclusion of the Northern States Power court is not questioned here. What is questioned, however, is the expansion

by the court below of the Northern States Power holding beyond anything ever envisioned by Congress- specifically, its conclusion that the Atomic Energy Act preempts the very narrow authority traditionally vested in the states to provide health and safety protections for their citizens through common law or statutory tort remedies. As conclusively shown by the State amici in their brief filed on July 17, 1982 in support of appellant's jurisdictional statement ("States' Brief"), Congress did not expressly or impliedly intend such broad preemptive effect, nor does there exist an unavoidable conflict between the state and federal law to force a conclusion that the two laws cannot constitutionally stand together.

Both the Court of Appeals and the Solicitor General rely heavily on Northern States Power to support preemption of the

Oklahoma punitive damages statute at issue here. This reliance is entirely misplaced.

To begin with, federal policy toward nuclear power has changed dramatically since this Court reviewed Northern States Power in 1972. Congress has in fact substantially overruled the case by passing the Clean Air Act Amendments of 1977, 42 U.S.C. 7401 et seq, which explicitly returns to state and local governments the power to regulate radiation hazards associated with radioactive air emissions.

Moreover, since Northern States Power, Congress has significantly changed the federal government's policy toward nuclear power, eliminating one of the Eighth Circuit's principle justifications for preempting the Minnesota statute. Specifically, Congress has now articulated a policy not to promote nuclear power or favor it over other energy forms. See,

States' Brief at 14-15. In 1974 Congress abolished the Atomic Energy Commission and created the NRC to focus exclusively on regulating nuclear power for the purpose of protecting the public health and safety. The development and promotional functions of the AEC were shifted to an entirely new governmental body created under an entirely new act of Congress. Under the new statutory scheme, nuclear power is not to be favored over other forms of energy. Thus, the court below is plainly wrong to advance the theory, perhaps valid at one time, that a "strong federal interest in atomic energy development," 667 F.2d at 922, now requires preemption of the state tort remedy at issue in this case.

Additionally, the facts of Northern States Power are explicitly distinguishable from those in the instant case. Most importantly, the Minnesota statute at issue in NSP regulated conduct related

to the operation of a nuclear power plant. It was precisely this type of state law -one regulating operation of a plant- which was found by the court to trigger the implicit preemptive effect of Section 274(k). It is one thing for a court to find implicit preemption under Section 274(k) of a state statute which directly regulates the operation of nuclear power plants - a function broadly served by a federal agency, the NRC. It is quite another thing, however, for a court to preclude a state from enforcing its own generally-applicable exemplary damages statute merely because it is applied to conduct which is also subject to federal regulation. A tort remedy is plainly not equivalent to a "regulation." It is invoked only to remedy actual injury, not to prevent predicted harm. Indeed, even in instances where the federal statutory direc-

tion is less clear, this Court has always accorded special deference to state tort laws in protecting them from federal preemption. See, States' Brief at 43-50.

Notably, Congress has never expressed an intent that the Atomic Energy Act preempt state tort remedies, particularly where individuals are injured by intentional or reckless handling of radioactive materials by a company licensed under the Act. Nor does the overall statutory scheme of the Act mandate such a conclusion. Section 274(k) itself is merely a "savings clause" which by its language preserves no exclusive authority to the federal government, but rather limits encroachment on state authority, if any, which the regulatory scheme may otherwise suggest. Moreover, other portions of the Act contain language indicating that Congress did not intend the federal government's authority to be exclusive in the regulation of nuclear

energy, or in the provision of remedies for radiation injuries. See, 42 U.S.C. 2021(a)(1)&(2), (g), (i).

When the issue of state tort remedies arose during Congress' consideration of the Price-Anderson Act, 42 U.S.C. 2210, Congress stated categorically that it intended states to apply their own tort laws in determining liability in nuclear litigation. See, H.R. Rep. No. 2043 and S. Rep. No. 1605, 89th Cong., 2d Sess. 9 (1966). Further, Congress made no distinction between the particular form of damages which were to be available to a litigant seeking relief under state tort law for radiation injuries. But as noted in the States' Brief at 28, Price-Anderson lacks materiality to resolution of issues in this case, since an "extraordinary nuclear occurrence" (ENO) is a prerequisite for coverage. State tort law rela-

ting to radiation injuries from "lesser events," or non-ENO's such as the instant case clearly is, was intended by Congress to remain entirely unaffected by Price-Anderson. H.R. Rep. No. 2043, supra, at 11.

Both the Court of Appeals and the Solicitor General make curious use of this seemingly clear expression of Congressional intent to support their conclusion that first, Price-Anderson's statutory ceiling on damages recoverable by private litigants against a private nuclear facility liable for causing an ENO is somehow inconsistent with the allowance of punitive damages, and second, that the same is true for lesser events entirely outside the purview of the Act. See, Solicitor General's Brief, at 15; 667 F.2d at 922. Both suggest that Congress' failure to discuss punitive damages in the legislative history necessarily evidences its belief that such damages are inappropriate remedies

under Price-Anderson. Id. This is not only wrong, but it conflicts with a long line of Supreme Court rulings that have erected a strong presumption against pre-emption of state laws enacted pursuant to the states' police powers, particularly those laws that protect public health and safety. See, States' Brief at 40-43. The issue here is not whether Congress expressly authorized the application of punitive damages, as the Solicitor General suggests, but whether it expressly or impliedly preempted them.

To arrive at the derivative conclusion that Congress did not intend the use of punitive damages for non-ENO events outside the purview of Price-Anderson, the Solicitor General first simply registers support for a distorted reading by the court below of the word "compensating," used in Duke Power Co. v. Environmental Study Group, Inc., 438 U.S. 59, 93 (1978). The

court below incorrectly interpreted the Supreme Court's mere observation in Duke Power that Price-Anderson compensated victims of ENO's, to be a declaration on its part that only compensatory and not punitive damages were to be available for such incidents. The Solicitor General then baldly asserts that punitive damages should be unavailable for non-ENO's as well. See, States' Brief at 27-29. This conclusion lacks any reasoned basis whatsoever, and is in fact inconsistent with the express intent of Congress to retain all state tort remedies as a basis for liability in radiation claims not declared to be ENO's.

The Solicitor General also suggests that Congress' "rejection of an Atomic Energy Commission proposal that the government [insurance fund] not be liable 'for loss or damage caused by bad faith, willful misconduct or gross negligence' on

the part of the [insured] licensee," cannot be considered evidence that Congress affirmatively contemplated the availability of punitive damages since that rejection was meant "not in order to allow punitive damages, but in order to assure compensation in all cases." Solicitor General's Brief at 15. Clearly, the more logical interpretation is that the proposal was rejected to insure full recovery of damages in all cases by specifically allowing for insurance coverage of punitive damages. The legislative history of the Act clearly shows that Congress contemplated the availability of "willful" damages, which equally clearly implies that Congress did not intend preemption of punitive damages. See, S. Rep. 2298, 84th Cong., 2d Sess. 8 (1956); States' Brief 27.

The Solicitor General's use of Dean Cavers' statement to buttress his argument

is particularly odd since both of Dean Cavers' suggestions were rejected by Congress. Solicitor General's Brief at 15-16, footnote 19. The Solicitor General's final comment, id., that somehow the NRC itself assumes that punitive damages are unavailable remedies because NRC licensees can raise "federal preemption" as a defense against punitive damage claims, stretches his argument to absurd proportions. If the NRC believed that punitive damages were legally prohibited, it would have simply said so in its regulations.

The Solicitor General also alludes in several instances to an alleged inconsistency or conflict between the Atomic Energy Act and the Oklahoma exemplary damages statute which would mandate preemption of the state law. The State amici have already conclusively shown this not to be the case. States' Brief at 9-22. Both state and federal efforts pur-

sue the common purpose of protecting public health and safety by deterring harmful conduct. The Oklahoma law does not interfere with accomplishment of the federal objectives in any way. Only if the purpose of NRC regulation was to promote the private nuclear power industry by immunizing from liability its acts which recklessly and willfully injure the public, could the Oklahoma statute interfere with the federal scheme. Needless to say, Congress has not established such a policy.

The Solicitor General presents for the Court's consideration the hypothetical case whereby a state agency would levy a fine against appellees for violating state law punishing the reckless and wanton infliction of physical injury by means of diverted radioactive materials. The Solicitor General, citing no authority in support, asserts that "there is no doubt that its action would be preempted by the

Atomic Energy Act." Solicitor General's Brief at 14. He then leaps to the conclusion that "[l]ike a civil fine, the award of ... punitive damages here directly conflicts with the exclusive authority given the NRC to regulate the health and safety hazards associated with plutonium and production facilities." Id.

As to his first premise, which has never been considered by this or any other court, there is of course considerable doubt whether such a state enforcement action would be preempted. If a state chose to prosecute for manslaughter and sought a sizable fine against a corporation for recklessly causing the fatal contamination of one of its citizens by radioactive materials, or alternatively imposed a civil fine in similar circumstances, only by some vast expansion of preemption doctrine heretofore contemplated only by the Solicitor General and certainly not by

Congress, could such an exercise of traditional state power be held impliedly or expressly preempted by Congress. As to his derivative conclusion, the Solicitor General ignores entirely the distinction which Congress and the courts have historically made between regulation on the one hand, and tort remedies on the other, to which they have always accorded special deference. See , States' Brief at 43-50. In short, the Solicitor General is simply wrong both in his general premise and in his derivative conclusion.

As the Solicitor General demonstrates, the NRC has promulgated a number of federal regulations aimed at advancing the interests of the public health and safety. Solicitor General's Brief at 12-13. The fact remains, however, that these regulations do not even purport to be comprehensive. They provide no tort remedies because the Atomic Energy Act does not

create a private damages action for radiation injuries. Far from expressing any desire that federal regulation be the exclusive means of meeting tort liability problems, Congress has indicated just the opposite intent. Certainly where the federal government has failed to effectively exercise its powers to protect the public, such as by providing adequate remedies to those injured by NRC licensees, the states must be able to exercise their own concurrent police powers to provide such effective remedies. In this case, the jury found, upon listening to the evidence, that Oklahoma's exemplary damages statute appropriately remedied an injury which the federal government did not.

CONCLUSION

Nowhere in the Atomic Energy Act or its legislative history has Congress ever

suggested an intent that the Oklahoma statute should not be enforced. For the courts to rule this statute preempted in the absence of some clear indication from Congress would amount to an unwarranted attack on the traditional rights of the states to protect the health and safety of their citizens.

Respectfully submitted,

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